

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

HOOMAN PANAH, an individual,

Plaintiff,

v.

STATE OF CALIFORNIA
DEPARTMENT OF CORRECTIONS
AND REHABILITATION, et al.,

Defendants.

No. C 14-00166 BLF (PR)

**ORDER SCREENING AMENDED
COMPLAINT; DISMISSING
CLAIMS WITH LEAVE TO AMEND;
DIRECTING DEFENDANTS TO
FILE OPPOSITION TO MOTION
FOR SUMMARY ADJUDICATION**

Plaintiff, an inmate on death row at California's San Quentin State Prison ("SQSP"), filed the instant *pro se* civil rights action pursuant to 42 U.S.C. § 1983, alleging unconstitutional acts by SQSP correctional officers. Plaintiff's amended complaint is currently before the Court for initial screening.

DISCUSSION

A. Standard of Review

A federal court must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. *See* 28 U.S.C. § 1915A(a). In its review, the court must identify

any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. *See id.* § 1915A(b)(1),(2). *Pro se* pleadings must, however, be liberally construed. *See Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) that a right secured by the Constitution or laws of the United States was violated, and (2) that the alleged violation was committed by a person acting under the color of state law. *See West v. Atkins*, 487 U.S. 42, 48 (1988).

B. Procedural Background

The instant action was commenced on January 12, 2014. (Docket No. 1.) Defendants filed motions for summary judgment and to dismiss (Docket Nos. 9 and 1), which the Court granted in part and denied in part on March 19, 2015 (Docket No. 22). The Court found that Plaintiff had stated a cognizable Bane Act claim against Officer Odum. *See* Docket No. 22 at 23–24. The Court dismissed the following claims with leave to amend: the Bane Act claim against Officer Anderson; the civil conspiracy claims against Officers Odum and Anderson; the Ralph Act claims against Officers Odum and Anderson, and the Fourth and Eighth Amendment claims against Officers Anderson and Odum. *See id.* at 19–25. The remaining claims and defendants were dismissed with prejudice. *See id.* at 8–17.

On June 17, 2015, Plaintiff filed an amended complaint against Officers Anderson and Odum alleging violations of his rights under the Fourth and Eighth Amendments; and alleging state-law claims of negligence and civil conspiracy; and alleging violations of the Bane Act and the Ralph Act. (Docket No. 26.)

C. Plaintiff's Claims

Plaintiff claims that he is the victim of an attempted murder which was either instigated by individual prison guards; and/or abetted by the inaction, gross negligence, or deliberate indifference of individual prison guards; and/or carried out with the

1 cooperation of individual prison guards. (Docket No. 26 (“Am. Compl.”) ¶ 1.)

2 According to the complaint, for approximately one year prior to February 4, 2012,
3 Plaintiff was subjected to “terrorist threats and harassments at the encouragement and
4 behest” of Correctional Officer Odum. (Am. Compl. ¶ 13.) On February 4, 2012,
5 without provocation, inmate Joseph Anthony Barrett, a known member of Aryan
6 Brotherhood, stabbed Plaintiff in the back several times, causing damage to Plaintiff’s
7 liver and lung. (*Id.* ¶¶ 4, 13.) Barrett chased Plaintiff around the prison yard with the
8 knife before he was subdued. (*Id.* ¶ 13.) During the attack and subsequent chase, Officer
9 Anderson was on duty as a gunner in the guard tower. (*Id.* ¶ 15.) Anderson observed the
10 event but did not raise her gun. (*Ibid.*)

11 Plaintiff’s injuries suggested that the blade used in the attack was not a common
12 prison shank, but rather a knife which was likely brought in from outside the prison.
13 (Am. Compl. ¶ 17.) Plaintiff alleges that because inmates are required to undergo a
14 security screening and strip search before entering the prison yard, Barrett likely had
15 assistance from prison staff in bringing the knife onto the yard. (*Id.* ¶ 18.)

16 Plaintiff alleges that Barrett’s attack on Plaintiff was “a result of a climate
17 perpetuated, or at a minimum, tolerated by prison staff, that created hostility against
18 Plaintiff among segments of the inmate population.” (Am. Compl. ¶ 19.) Officer Odum
19 contributed to this hostility by maintaining a “Wall of Shame” in his office where he
20 posted clippings about different inmates and their cases, including of Plaintiff and his
21 case. (*Id.* ¶ 20.)

22 Plaintiff names as defendants Officers Odum and Anderson, and Does 1-50.

23 **D. Discussion**

24 1. Federal Law Claims

25 In its March 19, 2015 order granting in part and denying in part Defendants’
26 motion for summary judgment and to dismiss (“March 2015 Order”), the Court dismissed
27 the Fourth and Eighth Amendment claims against Officers Anderson and Odum for
28 failure to state sufficient facts that there was any purposeful, individual involvement by

1 either officer in the stabbing attack. *See* Docket No. 22 at 20–21.

2 a) Fourth Amendment Claims

3 In his amended complaint, Plaintiff alleges that Officers Anderson and Odum have
4 violated his Fourth Amendment rights. However, he again fails to indicate *how* they have
5 violated his Fourth Amendment rights. The Fourth Amendment proscribes “unreasonable
6 searches and seizures,” U.S. Const. amend. IV, but the amended complaint does not
7 discuss any search or seizure, much less an unlawful one. Accordingly, Plaintiff’s Fourth
8 Amendment Claim is DISMISSED with leave to amend, if he can truthfully do so. *See*,
9 *e.g.*, *McQuillion v. Schwarzenegger*, 369 F.3d 1091, 1099 (9th Cir. 2004) (“Leave to
10 amend should be granted unless the pleading could not possibly be cured by the allegation
11 of other facts, and should be granted more liberally to pro se plaintiffs.”).

12 b) Eighth Amendment Claims

13 Plaintiff alleges that Defendants violated his Eighth Amendment rights. Liberally
14 construed, it appears that Plaintiff is alleging that Officers Anderson and Odum were
15 deliberately indifferent to his safety in violation of the Eighth Amendment. The failure of
16 prison officials to protect inmates from attacks by other inmates or from dangerous
17 conditions at the prison violates the Eighth Amendment when two requirements are met:
18 (1) the deprivation alleged is, objectively, sufficiently serious; and (2) the prison official
19 is, subjectively, deliberately indifferent to inmate health or safety. *Farmer v. Brennan*,
20 511 U.S. 825, 834 (1994). Neither negligence nor gross negligence will constitute
21 deliberate indifference. *See id.*, 511 U.S. at 835–36 & n.4 (1994); *Estelle v. Gamble*, 429
22 U.S. 97, 106 (1976). A prison official cannot be held liable under the Eighth Amendment
23 unless the standard for criminal recklessness is met, i.e., the official knows of and
24 disregards an excessive risk to inmate health or safety by failing to take reasonable steps
25 to abate it. *See Farmer*, 511 U.S. at 837. The official must both be aware of facts from
26 which the inference could be drawn that a substantial risk of serious harm exists, and he
27 must also draw the inference. *See id.*

28 Plaintiff alleges that Officer Odum’s encouragement of “terrorist threats and

1 harassment” against Plaintiff and Officer Odum’s “Wall of Shame” created a climate of
 2 hostility against Plaintiff among segments of the inmate population. *See* Am. Compl. ¶
 3 19. Liberally construed, Plaintiff’s amended complaint states an Eighth Amendment
 4 claim against Officer Odum for deliberate indifference to his safety.

5 Plaintiff’s only allegation in the complaint against Officer Anderson is that she
 6 witnessed Barrett stabbing Plaintiff and did not raise her gun during the attack. However,
 7 according to an exhibit attached to the amended complaint, Plaintiff’s mother appeared
 8 before the Victim Compensation and Government Claims Board and alleged that when
 9 Officer Anderson witnessed the attack on Plaintiff, Officer Anderson “did not blow her
 10 whistle or press the alarm to alert the other officers of the attempted murder; instead, . . .
 11 the officer laughed and smiled.” *See* Am. Compl., Ex. 1 at 6. In general, the Court must
 12 accept the material allegations in the complaint as true and construe them in the light most
 13 favorable to plaintiff. Where exhibits are attached to the complaint, Court is not limited
 14 to the allegations contained in the complaint, and can consider the exhibits. *Roth v.*
 15 *Garcia Marquez*, 942 F.2d 617, 625 n. 1 (9th Cir. 1991). Liberally construed, Plaintiff’s
 16 amended complaint states an Eighth Amendment claim against Officer Anderson for
 17 deliberate indifference to his safety.

18 2. State Law Claims

19 a) Bane Act Claims

20 In his first cause of action, Plaintiff alleges that Defendants have violated his rights
 21 under the Bane Act.¹ (Am. Compl. ¶¶ 33–38.) The Bane Act, codified at California Civil
 22 Code § 52.1, makes it unlawful for any person to “interfere[] by threats, intimidation, or
 23 coercion, or attempt[] to interfere by threats, intimidation, or coercion, with the exercise
 24 or enjoyment by any individual or individuals of rights . . . secured by the Constitution or
 25 laws of this state.” *Id.* at § 52.1. The Court found that Plaintiff had stated a cognizable
 26

27 ¹Plaintiff cites California Civil Code § 43 in his first cause of action. As the Court
 28 noted in its March 2015 Order, Plaintiff’s Section 43 claim is properly brought via the
 Bane Act, codified at California Civil Code § 52.1. *See* March 2015 Order at 21 n. 10.

1 Bane Act claim against Officer Odum, but not against Officer Anderson since there were
2 no specific allegations that she had engaged in any threats, intimidation or coercion in her
3 actions as yard gunner during the attack. Plaintiff's amended complaint fails to cure this
4 deficiency. The only allegation against Officer Anderson is that she witnessed the attack
5 and did not raise her gun.

6 Because Plaintiff is now proceeding as a *pro se* litigant and this deficiency could
7 feasibly be cured through amendment, the Bane Act claim against Officer Anderson is
8 dismissed with leave to amend.

9 b) Ralph Act Claims

10 In his second cause of action, Plaintiff alleges that Defendants violated his rights
11 under section 51.7 of the California Civil Code, the Ralph Act (Am. Compl. at 9–10),
12 which provides that “all persons within California have the right to be free from any
13 violation, or intimidation by threat of violence, committed against the person on account
14 of race.” *Knapps v. City of Oakland*, 647 F. Supp. 2d 1129, 1167 (N.D. Cal. 2009) (citing
15 Civil Code § 51.7). A claim brought under Section 51.7 requires a plaintiff to plead four
16 elements: (1) the defendant threatened or committed violent acts against the plaintiff; (2)
17 the defendant was motivated by his perception of plaintiff's race; (3) the plaintiff was
18 harmed; and (4) the defendant's conduct was a substantial factor in causing the plaintiff's
19 harm. *See, e.g., Austin B. v. Escondido Union Sch. Dist.*, 14 Cal. App. 4th 860, 880–81
20 (Cal. Ct. App. 2007).

21 Plaintiff's Ralph Act claims in the amended complaint against Officers Odum and
22 Anderson are deficient for the same reasons his claims in the original complaint were
23 deficient. He fails to allege that Officer Odum threatened him with violence; that Officer
24 Odum was motivated to harm Plaintiff because of Plaintiff's race; and that Officer
25 Odum's conduct had any casual link to his stabbing. Similarly, he failed to allege that
26 Officer Anderson threatened him with violence; that Officer Anderson was motivated to
27 harm him because of his race; or that Officer Anderson's conduct was a substantial factor
28 in his stabbing.

1 Because Plaintiff is now proceeding as a *pro se* litigant and this deficiency could
 2 feasibly be cured through amendment, the Court will dismiss the Ralph Act claims against
 3 Officers Odum and Anderson with leave to amend, if Plaintiff can truthfully do so.
 4 Plaintiff is again cautioned that “[t]hreadbare recitals of the elements of a cause of action,
 5 supported by mere conclusory statements, do not suffice [to meet Rule 8’s pleading
 6 requirements].” *Ashcroft*, 556 U.S. at 678.

7 c) Negligence *Per Se*

8 In his third cause of action, Plaintiff claims that Defendants have been *per se*
 9 negligent in violation of sections 2650 and 2652 of the California Penal Code, and of
 10 sections 3271 and 3341.5 of the California Code of Regulations, title 15. (Am. Compl. at
 11 10–12.) Under the negligence *per se* doctrine, which is codified by section 669 of the
 12 California Evidence Code, negligence is presumed if the plaintiff establishes four
 13 elements: (1) the defendant violated a statute or regulation; (2) the violation caused the
 14 plaintiff’s injury; (3) the injury resulted from the kind of occurrence the statute or
 15 regulation was designed to prevent; and (4) the plaintiff was one of the class of persons
 16 the statute or regulation was intended to protect. *Daum v. SpineCare Med. Grp., Inc.*, 61
 17 Cal. Rptr. 2d 260, 271 (Cal. Ct. App. 1997). Liberally construed, Plaintiff has stated a
 18 cognizable state-law claim against Defendants for negligence *per se*.²

19 d) Civil Conspiracy

20 In his amended complaint, Plaintiff again alleges the existence of a conspiracy on
 21 the part of the individual defendants to assist inmate Barrett in attempting to murder
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23 ²However, it appears from the face of the amended complaint that Plaintiff may be
 24 time barred from bringing such claims. Plaintiff filed a claim with the Victim
 25 Compensation and Government Claims Board (“Board”) regarding the February 4, 2012
 26 stabbing. (Am. Compl. at 3 and Ex. 1.) Under the California Tort Claims Act, a plaintiff
 27 must file a court action within six months of the date his notice of rejection of his claim
 28 was personally delivered or deposited in the mail. *See* Cal. Gov’t Code § 945.6. The
 Board rejected his claim on October 18, 2012. (Am. Compl. at 3 and Ex. 2.) This instant
 action was commenced on January 12, 2014, over a year after the claim rejection was
 issued.

1 Plaintiff, *see, e.g.*, Am. Compl. ¶ 32, even though he does not list civil conspiracy as a
2 cause of action. Because the Court construes the complaint liberally, the Court presumes
3 that Plaintiff is also alleging that Defendants have engaged in a civil conspiracy.
4 However, Plaintiff's civil conspiracy claims still suffer from the same deficiencies
5 identified in the March 2015 Order.

6 Under California law, civil conspiracy requires a plaintiff to plead that "the
7 conspiring parties reached a unity of purpose or a common design and understanding, or a
8 meeting of the minds in an unlawful arrangement." *See Gilbrook v. City of Westminster*,
9 177 F.3d 839, 856 (1999) (citing *Vieux v. East Bay Reg'l Park Dist.*, 906 F.2d 1330, 1343
10 (9th Cir. 1990)). Each conspirator "need not know the exact details of the plan, but each
11 participant must at least share the common objective of the conspiracy." *Id.* at 856 (citing
12 *United Steelworkers of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1541 (9th Cir. 1989)
13 (en banc)). Further, civil conspiracy claims are subject to a heightened pleading standard,
14 demanding that a plaintiff allege specific facts "containing evidence of unlawful intent, or
15 face dismissal of the claim." *Buckey v. Cnty. of Los Angeles*, 968 F.2d 791, 794 (9th Cir.
16 1992).

17 Plaintiff's amended complaint does not make any such specific allegations.
18 Plaintiff does not allege any "meeting of the minds" between Officers Odum and
19 Anderson to harm Plaintiff, let alone facts to show a conspiracy by Officers Odum and
20 Anderson to help a prisoner stab Plaintiff. Cursory allegations that Officer Odum
21 encouraged threats and harassment against Plaintiff and that Officer Anderson smiled and
22 laughed during the attack are insufficient to state a claim for civil conspiracy. Such a
23 failure to plead any specific allegations demands that the conspiracy claim be dismissed.
24 *See Buckey*, 968 F.2d at 794.

25 Because Plaintiff is now proceeding as a *pro se* litigant and this deficiency could
26 feasibly be cured through amendment, the Court will dismiss the civil conspiracy claims
27 against Officers Odum and Anderson with leave to amend, if Plaintiff can truthfully do
28 so. Plaintiff is again cautioned that "[t]hreadbare recitals of the elements of a cause of

1 action, supported by mere conclusory statements, do not suffice [to meet Rule 8's
2 pleading requirements]." *Ashcroft*, 556 U.S. at 678.

3 3. Doe Defendants

4 Plaintiff names "Does 1 through 50" as defendants, but states that he knows
5 neither their true names nor their capacities. The use of Doe Defendants is not favored in
6 the Ninth Circuit. *See Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). However,
7 where the identity of alleged defendants cannot be known prior to the filing of a
8 complaint the plaintiff should be given an opportunity through discovery to identify them.
9 *Id.* Failure to afford the plaintiff such an opportunity is error. *See Wakefield v.*
10 *Thompson*, 177 F.3d 1160, 1163 (9th Cir. 1999). Accordingly, the Doe Defendants are
11 DISMISSED from this action without prejudice. Should Plaintiff learn their identities, he
12 may move to file an amendment to the complaint to add them as named defendants. *See*
13 *Brass v. County of Los Angeles*, 328 F.3d 1192, 1195–98 (9th Cir. 2003).

15 CONCLUSION

16 For the reasons stated above, the Court orders as follows:

17 1. As detailed above, Plaintiff has stated a cognizable Eighth Amendment
18 claim and state law negligence claim against Officers Odum and Anderson. Plaintiff has
19 also stated a cognizable Bane Act claim against Officer Odum. The Doe Defendants are
20 dismissed from this action without prejudice.

21 2. The following claims are dismissed with leave to amend: the Bane Act
22 claim against Officer Anderson; and the Ralph Act claim and the civil conspiracy claim
23 against Officers Odum and Anderson. If Plaintiff wishes to amend these claims, he must
24 file a second amended complaint, no later than **thirty (30) days** of the date this order is
25 filed, Plaintiff shall file a second amended complaint. The second amended complaint
26 must include the caption used in this order, the civil case number used in this order, Case
27 No. C 14-00166 BLF (PR), and the words "SECOND AMENDED COMPLAINT" on the
28 first page. If using the court form complaint, Plaintiff must answer all the questions on

1 the form in order for the action to proceed.

2 **An amended complaint completely replaces the previous complaints.** Plaintiff
 3 must therefore include in his second amended complaint all the claims he wishes to
 4 present and all of the defendants he wishes to sue, including the claims which the Court
 5 has already found cognizable. *See Ferdik v. Bonzelet*, 963 F.2d 1258, 1262 (9th Cir.
 6 1992). Plaintiff may not incorporate material from the prior complaint by reference.
 7 Claims and defendants not included in the second amended complaint will not be
 8 considered by the Court. *See King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987), *overruled*
 9 *on other grounds by Lacey v. Maricopa County*, 693 F.3d 896 (9th Cir. 2012). The
 10 second amended complaint must be simple, concise and direct and must state clearly and
 11 succinctly how each and every Defendant is alleged to have violated Plaintiff's federally-
 12 protected rights. *See Fed. R. Civ. P. 8(a)(2)*.

13 Failure to file an amended complaint within twenty-eight days and in accordance
 14 with this order will result in a finding that further leave to amend would be futile and this
 15 action will proceed solely on the cognizable claims identified above. The Clerk shall
 16 include two copies of the court's complaint with a copy of this order to Plaintiff.

17 3. In the alternative, Plaintiff may file a motion to proceed solely on the claims
 18 identified as cognizable above (Eighth Amendment claim and state law negligence claim
 19 against Officers Odum and Anderson; and Bane Act claim against Officer Odum). In
 20 order to do so, he should file a notice requesting to voluntarily dismiss the Bane Act claim
 21 against Officer Anderson; and the Ralph Act claim and the civil conspiracy claim against
 22 Officers Odum and Anderson; and requesting to proceed on the claims which the Court
 23 has already identified as cognizable.

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1 4. Plaintiff has filed a motion for summary adjudication as to whether his
2 attempt to exhaust his administrative remedies was thwarted by the action of prison staff.
3 The Court orders Defendants to file an opposition to this motion with **twenty-eight (28)**
4 **days** of the date of this order. Plaintiff shall file a reply brief no later than **fourteen (14)**
5 **days** after Defendants' opposition is filed.

6 **IT IS SO ORDERED.**

7
8 DATED: July 14, 2015


BETH LABSON FREEMAN
United States District Judge